Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Jordan Rooley,

applicant,

and

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers),

respondent,

and

Canadian Imperial Bank of Commerce,

employer.

Board File: 30254-C
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Counsel of Record

Mr. Kenneth M. Dolinsky, for Mr. Jordan Rooley;

Mr. Robert Champagne, for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers);

Mr. Simon Mortimer, for the Canadian Imperial Bank of Commerce.

On December 18, 2013, Mr. Jordan Rooley (the applicant) filed an application with the Canada Industrial Relations Board (the Board) seeking the revocation of an order certifying the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and

Service Workers International Union (United Steelworkers) (USW or the union) as bargaining agent for a unit of employees of the Canadian Imperial Bank of Commerce (CIBC or the employer) working in Sudbury, Ontario (Board order no. 8917-U).

The application was considered by the Board, composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Robert Monette and Norman Rivard, Members. Having reviewed the written submissions of the parties and finding them to be sufficient, the Board exercised its discretion under section 16.1 of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*) to decide the matter without an oral hearing.

The parties were informed on January 31, 2014, that the application had been dismissed. These are the reasons for that decision.

I. Background

[1] The union has been the certified bargaining agent for employees at the CIBC's branches in Sudbury, Ontario since July 2005. The union and the employer negotiated successive collective agreements, including one for a two-year term from December 1, 2011 to November 30, 2013. The union served a notice to bargain for renewal of that agreement on September 10, 2013 and negotiations were conducted in December 2013.

[2] Between November 19 and December 17, 2013, a number of the employees in the bargaining unit signed individual forms resigning their membership in the USW, indicating that they no longer wished to be represented by the union and authorizing the applicant to act on their behalf. The applicant filed the application for revocation of the union's certification at approximately 9:10 a.m. on Wednesday, December 18, 2013. Unknown to the applicant, four of the employees who had signed forms resigning their union membership decided to withdraw their support for the revocation application, and signed letters on December 9 and 10, 2013 in which they revoked and denied their support for any attempt to decertify the union, and reaffirmed their desire that the union continue as their certified bargaining agent.

[3] Although the union and the employer were aware that the revocation application had been filed that morning, they continued their negotiations on December 18, 2013. The parties reached and signed a Memorandum of Settlement (MOS) at approximately 1:30 p.m. that day. The MOS was approved by the management of the CIBC that afternoon. The union convened a membership meeting the same evening, which was attended by 37 of the 52 employees in the bargaining unit. The MOS was ratified by a vote of 29–8. At approximately 7:30 p.m. on December 18, 2013, the union advised the employer that the MOS had been ratified by the union membership.

[4] Paragraph 6 of the MOS provides:

> 6. All of the provisions of this memorandum and the Schedule of Agreed Terms will come into force only from the date of ratification going forward and not retroactively. If the agreement is ratified by December 18, 2013, the Employer will implement the wage increase in the Schedule of Agreed Terms effective December 1, 2013.

[5] The issues for the Board were whether the application for revocation of the union's bargaining rights was timely, and if so, whether the applicant had the support of a majority of the employees in the bargaining unit.

II. The Law

[6] The provisions of the *Code* relating to revocation applications read as follows:

> 38. (1) Where a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union.
>
> (2) An application for an order pursuant to subsection (1) may be made in respect of a bargaining agent for a bargaining unit,
>
> > (*a*) where a collective agreement applicable to the bargaining unit is in force, **only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24 unless the Board consents to the making of the application for the order at some other time;** and
> >
> > (*b*) where no collective agreement applicable to the bargaining unit is in force, at any time after a period of one year from the date of certification of the trade union.
>
> (3) Where a collective agreement applicable to a bargaining unit is in force but the bargaining agent that is a party to the collective agreement has not been certified by the Board, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5),

apply to the Board for an order declaring that the bargaining agent is not entitled to represent the employees in the bargaining unit.

(4) An application for an order pursuant to subsection (3) may be made in respect of a bargaining agent for a bargaining unit,

> (*a*) during the term of the first collective agreement that is entered into by the employer of the employees in the bargaining unit and the bargaining agent,
>
> > (i) at any time during the first year of the term of that collective agreement, and
> >
> > (ii) thereafter, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24; and
>
> (*b*) in any other case, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24.

(5) An application under subsection (1) or (3) must not, except with the consent of the Board, be made in respect of the bargaining agent for employees in a bargaining unit during a strike or lockout of those employees that is not prohibited by this Part.

39. (1) Where, on receipt of an application for an order made under subsection 38(1) or (3) in respect of a bargaining agent for a bargaining unit, and **after such inquiry by way of a representation vote or otherwise as the Board considers appropriate in the circumstances, the Board is satisfied that a majority of the employees in the bargaining unit no longer wish to have the bargaining agent represent them,** the Board shall, subject to subsection (2), by order,

> (*a*) in the case of an application made under subsection 38(1), revoke the certification of the trade union as the bargaining agent for the bargaining unit; or
>
> (*b*) in the case of an application made under subsection 38(3), declare that the bargaining agent is not entitled to represent the employees in the bargaining unit.

(2) Where no collective agreement applicable to a bargaining unit is in force, no order shall be made pursuant to paragraph (1)(*a*) in relation to the bargaining agent for the bargaining unit unless the Board is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit.

(emphasis added)

[7] The time periods for filing a revocation application are established in section 24(2) of the *Code*:

> 24. (2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made

> (*a*) where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time;
>
> (*b*) where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;
>
> (*c*) **where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation;** and
>
> (*d*) where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only
>
> > (i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and
> >
> > (ii) after the commencement of the last three months of its operation.

(emphasis added)

III. Positions of the Parties

A. The Applicant

[8] The applicant submits that the revocation application is timely, as it was filed after the commencement of the last three months of the collective agreement that expired on November 30, 2013. He relies on the Board's decision in *Friesen*, 2009 CIRB 436, for the proposition that a revocation application can be filed not only during those three months, but also at any time thereafter, so long as a new collective agreement has not been signed.

[9] The applicant submits that his revocation application was filed before the MOS was signed by the parties or ratified by the employees and therefore is timely. The MOS was signed after the revocation application was filed and cannot act as a bar to that application. The applicant relies on a decision by the Canada Labour Relations Board (CLRB), *Maritime Employers' Association and Terminaux Portuaires du Québec* (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRB no. 642) in which the CLRB determined that it could hear a revocation application that had been filed on the morning of the day on which the union later concluded a collective

agreement with the employer. The Board held that the application could be heard because it was filed before the new collective agreement had been reached.

[10] The applicant submits that, at the time he filed the revocation application with the Board, he had the support of a majority of the employees in the bargaining unit. He states that he was not put on notice, by the union or any of the employees, that employees who had signed cards supporting the revocation had withdrawn that support before he filed the application on December 18, 2013. The applicant submits that since he was not notified of any counter-support evidence before the filing date, such evidence should carry no weight.

B. The Union

[11] The union argues that the revocation application is untimely. The union submits that, as set out in paragraph 6 of the MOS, the renewal collective agreement was effective upon ratification, December 18, 2013, and was in operation on December 1, 2013, the date on which the retroactive salary increases took effect. It argues that the renewal agreement was therefore in effect and operating on the date that the revocation application was filed. It submits that the application is untimely because it was not made after the commencement of the last three months of operation of the renewal collective agreement.

[12] The union submits that the Board should disregard the time of day that the events occurred, and suggests that a parsing of hours within a single day–as part of determining when a collective agreement "operates"–would undermine the language of section 24(2)(*c*) of the *Code*, which directs the Board to have regard to when a collective agreement "operates". It urges the Board to adopt a bright line test: if a collective agreement is in effect and operating on a given date, the Board should find that an application to revoke its certification made on that date is untimely.

[13] The union also submits that the applicant does not have the support of a majority of employees in the bargaining unit, since a number of the employees withdrew their support for the revocation application prior to the date on which it was filed with the Board. The union also submits that the wishes of an individual who is currently working in a managerial position outside of the bargaining unit on a temporary basis should not be considered, as she has not provided any indication to the union as to her expected date of return to the bargaining unit.

It argues that she does not have a sufficient and continuing interest in employment within the bargaining unit.

[14] The union asks that the revocation application be dismissed.

C. The Employer

[15] The employer confirmed the sequence of the events that occurred on December 18, 2013. It also indicated that there are currently 51 employees in the bargaining unit, plus one individual who has been on a temporary assignment outside of the bargaining unit, acting as an Assistant Branch Manager, since October 15, 2012. It indicates that, although this individual has a right of return to the bargaining unit, she was not employed in the bargaining unit on the day of the revocation application.

IV. Analysis and Decision

A. Timeliness of the Application

[16] In *Friesen*, *supra*, the Board confirmed that the time period for a revocation application remains open following the expiry date of a collective agreement, so long as the parties have not concluded a new collective agreement:

> [13] Under section 38 of the *Code*, a revocation application is timely if it corresponds to the periods set out for an application for certification in section 24. In the case of a collective agreement that had a three-year duration, which was the case here, the period when an application for revocation could be made started during the last three months of the agreement (namely, three months prior to September 30, 2007). In this case, the application was filed well after the last three months of the collective agreement, which is permitted under the *Code* as long as a new collective agreement has not been concluded by the parties. The "window" for purposes of filing a revocation application remains open following the expiry of the collective agreement as long as that agreement remains in effect through the operation of a continuation clause while the parties bargain a renewal agreement unless the parties acquire the right to strike or lockout. **The "window" closes as soon as the parties conclude a new collective agreement, as this creates a new period for filing a revocation application under section 38(2) of the *Code*.** ...
>
> (emphasis added)

[17] The determination as to whether a new collective agreement has been concluded and is in operation is fact specific. As the Board stated in *Shaw Cablesystems G.P.*, 2003 CIRB 211:

[16] The concluding clause of the agreement indicates that it was signed by the parties, the employer, Rogers Cable Inc. (White Rock) and the union, on September 5, 2000.

[17] What is of relevance in the present circumstances is a determination of the date of "operation" of the collective agreement since, if reference is made to section 24(2)(*d*) of the *Code*, it is the date of "operation" of an applicable collective agreement that determines when an application for certification or an application for revocation of the certification of a trade union may be made.

[18] Because there is no clearly identified date of "operation" in the collective agreement, a number of possibilities must be considered. The first of these is that the dates of the operation of the collective agreement should be viewed as the dates set out in the above paragraph respecting effective dates. The effective date of the White Rock collective agreement stipulated in the "Effective Dates" clause is September 9, 1997 (although it is contended that this date is in error and should be September 29, 1997). A second possibility is that the agreement should be viewed as in operation on May 1, 2000, or a day on or about that day. This possibility will be discussed in more detail below. A third possibility to consider is whether the agreement became operative on the date it was actually signed, that is September 5, 2000.

[19] **It should again be emphasized here that the relevant dates upon which a determination of the open period for an application for revocation should be based are not necessarily the effective date of the collective agreement, the date on which it was signed, nor the date on which the agreement was stated to be made and entered into, as indicated on its face. The Board's responsibility in these circumstances is to apply the relevant sections of the *Code*, that is sections 38 and 24, in accordance with their terms and intent.** The terms of section 24(2)(d) cited above, indicate that in circumstances such as the present, where the collective agreement applicable to the relevant bargaining unit is in force and for a term of more than 3 years, an application for certification or revocation may only be made after the commencement of the thirty-fourth month of the operation of the collective agreement. It is therefore the period of "operation" of a collective agreement that is relevant in the circumstances. Because the terms of the agreement in consideration in the present circumstances on the face of the agreement are ambiguous or inconclusive in respect of its date of "operation," indicating that the agreement was made and entered into on May 1, 2000, that it was signed on September 5, 2000, and that in some respect it was intended to "become effective" on September 9, 1997, (or September 29), **more detailed attention must be directed to the circumstances of its negotiation and conclusion and other relevant factors in order to decide what is the period of its "operation" for the purposes of section 38 (and 24(2)(d)) of the *Code*.**

(emphasis added)

[18] The Board cannot accept the USW's submission that the Board should not parse the hours within a single day when interpreting the *Code*. The purpose of sections 38 and 24(2) of the *Code* is to provide an ascertainable period for the filing of applications to displace an incumbent bargaining agent. The ability to determine, with certainty, the legal time period for such applications is important as it contributes to industrial stability.

[19] In the current case, the revocation application was filed by means of hand delivery to the Board's office at approximately 9:10 on the morning of December 18, 2013. The union and the employer admit that the MOS was not reached until approximately 1:30 that afternoon.

The MOS called for ratification by both parties, which was only completed when the union membership voted later that evening. The circumstances of this case are similar to those which the CLRB considered in *Maritime Employers' Association and Terminaux Portuaires du Québec, supra*. In that case, the Board determined that it could hear a displacement application that had been filed on the morning of the day on which the union and the employer later concluded a collective agreement. The circumstances in the current matter are the converse of the situation that existed in *Handlex Groundhandling Services Inc.*, 2009 CIRB 480 (*Handlex*), where the ratification of a new agreement took place several hours before a displacement application was filed. In the *Handlex* case, the Board held that the time period for the filing of the displacement application had expired once the new agreement was ratified and that the application was therefore untimely.

[20] At the time when the applicant in the instant matter filed his revocation application with the Board, the renewal collective agreement had not yet been reached or ratified by the union or the employer. Therefore, the time period that applies to the revocation application must be calculated based on the expiry date of the previous collective agreement. That collective agreement was for a term of not more than three years, and the revocation application was filed after the commencement of the last three months of its operation, in accordance with section 24(2)(*c*) of the *Code*. Accordingly, the Board finds that the revocation application is timely and can be considered by the Board.

B. Support for the Application

[21] Once the Board has certified a trade union as the bargaining agent for a bargaining unit, the union is presumed to have the continuing support of a majority of the employees in the bargaining unit unless and until this presumption is displaced by evidence.

[22] Section 38(1) of the *Code* permits any employee who claims to represent a majority of the employees in the bargaining unit to apply to the Board for an order revoking the certification of that trade union. However, to displace the presumption that the trade union has majority support, the applicant must demonstrate that he actually has the support of the majority.

[23] It has been the longstanding practice of this Board, and its predecessor the CLRB, to assess support for a certification, revocation or displacement application as of the date of the application, unless there is good reason to use a different date (see *CJMS Radio Montréal (Québec) Limitée* (1978), 33 di 393; and [1980] 1 Can LRBR 270 (CLRB no. 151); and *Algoma Central Marine, a Division of Algoma Central Corporation*, 2009 CIRB 469).

[24] The applicant collected support for his revocation application between November 19 and December 17, 2013. As it was known that there are 51 employees in the bargaining unit, the applicant believed that he had majority support and filed the application on December 18, 2013. However, unknown to the applicant, between December 2 and 10, 2013, a number of employees signed forms revoking their support for any attempt to decertify the union and reaffirming their desire to continue to be represented by the USW. As a result of these withdrawals of support for the revocation application, the applicant did not in fact have majority support at the time he filed the revocation application on December 18, 2013.

[25] The applicant argues that the Board should disregard the evidence of the change of heart by employees in the bargaining unit because this information was not made known to him prior to the filing of his application. In this regard, the applicant relies on the Board's jurisprudence, which requires that resignations from union membership prior to the date of a certification application be communicated to the union in order to be effective.

[26] There is nothing in the *Code* or the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*) preventing employees from changing their minds about support for a certification or a revocation application. An employee's decision to sign a union membership card or an expression of support for a revocation application is not irrevocable. It is for this reason that the Board has adopted a practice of determining support for certification, revocation and displacement applications as of the date of the application.

[27] However, the Board's assessment of support is also guided by the requirements of section 35 of the *Regulations*, which state:

CONFIDENTIALITY OF EMPLOYEES' WISHES

35. The Board shall not disclose to anyone evidence that could reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented by or not to be represented by a trade union, unless the disclosure would be in furtherance of the objectives of the Code.

[28] An employee who wishes to withdraw his support for a union certification application must inform the union of this change of heart before the application for certification is filed for that wish to prevail. Receiving notification of a change in the employee's support ensures that the union does not file a certification application with less than majority support. As the consequence of an unsuccessful application for certification is the automatic imposition of a six-month time bar for a second application (see section 38 of the *Regulations*), it is critical that an applicant for certification know whether or not it has sufficient support at the time it makes the application. Advance notice that an employee has resiled from union membership provides the union with time to continue seeking support from other employees and/or to make a considered decision as to whether it has sufficient support to file an application at all.

[29] The circumstances with respect to revocation applications are somewhat different. In such cases, there is no obligation on the employee to make a payment to the applicant as evidence of support, as is the case in certification applications. This absence of a financial stake in the outcome of the application can result in peer pressure to sign a revocation application, and makes it more likely that employees will have a change of heart once all of the facts become known to them, as was the case here. In view of the regulatory requirement for confidentiality and the potential for undue pressure, the Board finds that there is no obligation on the part of employees to notify the applicant that they no longer support a revocation application. Imposing such a requirement would deny the employees in question the benefit of the policy behind section 35 of the *Regulations*.

[30] Although section 38 of the *Regulations* also imposes a time bar on repeat applications for revocation, this provision has no practical effect in the instant case, since the signing of the renewal collective agreement has closed the open period during which this revocation application

was filed. The next open period for a revocation application will not occur until the commencement of the last three months of the operation of the new collective agreement.

[31] Accordingly, taking into account the wishes of the employees who had changed their minds prior to the date on which the revocation application was filed, the Board finds that the applicant did not have majority support as of that date. Accordingly, the presumption that the union continues to have majority support among the members of the bargaining unit has not been displaced.

[32] This conclusion is supported by the results of the ratification vote conducted by the union on December 18, 2013. Of the 51 employees in the bargaining unit, 37 attended and voted at the meeting. Of these, 29 or 57% of the bargaining unit voted in favour of accepting the MOS. Similar to the situation in *Handlex*, *supra*, had the employees who attended the ratification meeting not wished to have the USW continue as their bargaining agent, then they only needed to vote against the MOS. That would have ensured that no collective agreement came into force and left the window open for another revocation application.

[33] For all of these reasons, the application for revocation of the union's bargaining rights is dismissed.

[34] Given the disposition of the application, it is not necessary for the Board to determine the status of the bargaining unit member who has been on a temporary assignment as an assistant branch manager for more than one year. However, the Board takes this opportunity to observe that the length of an individual's absence from the workplace, the reason for the absence and the likelihood of their return to work are appropriate factors to consider when evaluating the sufficiency or continuity of an employee's interest in the affairs of the bargaining unit (see *Robin Hood Multifoods Limited* (1978), 25 di 449; 78 CLLC 16,165 (CLRB no. 136) and *Steve Baidwan* (1985), 62 di 99; and 85 CLLC 16,046 (CLRB no. 526). The onus is on the party that seeks to exclude consideration of an absent employee's wishes to show that there is no reasonable expectation that the employee will return to the bargaining unit (see *Algoma Central Marine, a Division of Algoma Central Corporation*, *supra*).

[35] The union requested that a time bar be imposed on subsequent applications for revocation. As noted above, the next open period will not occur for more than six months. Accordingly, there is no need to impose such a bar. The Board also notes that, in the course of these proceedings, the union made certain allegations regarding employer involvement in the revocation application. Because the application has been determined on the basis set out above, the Board has made no finding in respect of these allegations, and considers them to be moot.

[36] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Robert Monette
Member

Norman Rivard
Member